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IN THE

Supreme Court of the United States

October Term, 1978
No. 78-269

MILGO ELECTRONIC CORPORATION and INTERNATIONAL COMMUNICATIONS CORPORATION,

Petitioners,

vs.

WESTERN ELECTRIC COMPANY, INC. and AMERICAN TELEPHONE & TELEGRAPH COMPANY,

Respondents.

Reply of Petitioners to Respondents' Statement.

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Respondents.

Reply of Petitioners to Respondents' Statement.

Petitioners hereby reply to matters and arguments first raised by respondents in response to the petition.

Respondents ostensibly agree with the Court of Appeals decision on Milgo's petition for rehearing while substantively failing to offer to consent to a jury trial on the equitable misuse issue, despite the suggestion from the Court of Appeals that such consent would be an adequate safeguard of Milgo's right to a jury trial. Further, respondents have mischaracterized and misapplied the cited recent district court decisions dealing with antitrust immunity. Finally, respondents have presented an incomplete picture with respect to the district court decisions dealing with antitrust immunity since it made no mention of *Macon Products Corporation v. American Telephone & Telegraph Company*, 359 F.Supp. 973 (C.D.Ca. 1973), or the decision

in *International Telephone and Telegraph Corporation v. General Telephone & Electronics Corporation*, Civil Action No. 2754 (D. Hawaii, February 28, 1978),[1] which are both very pertinent to the question of Western Electric Company's (hereinafter Western) immunity.

In its response, respondents state that Milgo's reason for granting the writ based on its loss of its right to a jury "is wholly lacking in merit" and "requires no further discussion," relying solely on the Court of Appeals decision on Milgo's petition for rehearing. Milgo urges that such response evades the issue, particularly the discussion by the Court of Appeals of possible safeguards for Milgo's constitutional right to a jury trial.

The Court of Appeals stated that the trial judge might order a jury trial on the DAA-misuse issue with the consent of both parties, thereby clearly giving respondents the opportunity to stipulate to a jury trial on the DAA-misuse issue. The language of the Court of Appeals clearly refers to Rule 39(c) of the Federal Rules of Civil Procedure and is very similar to the language of the rule.

However, respondents have made no effort to consent to a jury trial on the DAA-misuse issue. In fact, respondents have clearly indicated that no consent will be forthcoming by their unyielding assertion of the correctness of the decisions below, their assertion of immunity,[2] and their regard that the jury trial issue "requires no further discussion."

[1]This decision is currently unreported, but is quite lengthy and therefore, not attached.

[2]AT&T, through the reply of the Bell System respondents in FCC Docket No. 19419, indicated at page 23 that since the antitrust laws are not applicable in court proceedings

Therefore, the safeguards asserted by the Court of Appeals, and ostensibly adopted by respondents, are illusory since the only viable safeguard, namely consent by respondents, is clearly beyond reach.

Further, respondents' characterization of the state of district court decisions dealing with antitrust immunity is misleading. Contrary to respondents' assertions, the decisional law most relevant to this case indicates that the balance tips in favor of no antitrust immunity. *Macon Products Corporation v. American Telephone and Telegraph Company, supra,* and *General Telephone & Electronics Corporation, supra,* both held that communications common carriers are not immune from the antitrust laws. As previously indicated, these decisions were not mentioned by AT&T.

Moreover, the decisions relied upon by respondents are inapposite and distinguishable. In particular such decisions merely state conclusions of immunity without a thorough analysis of the actual nature of the FCC regulation and do not consider to what extent the allegedly immune acts were required by the FCC, or condoned by the Communications Act. Thus, such cases failed to consider the practical nature and extent of regulation.

However, a decision adverse to respondents in *United States v. American Telephone & Telegraph Company*, Civil Action No. 74-1698 (D.D.C. September 11, 1978),[3] and therefore glossed over by respondents as

involving AT&T, the antitrust laws are not applicable in an FCC proceeding. The cover sheet and page 23 of the Bell System reply is attached as Appendix A.

[3]Judge Greene's decision was entered subsequent to the filing of the petition here involved. The cover page and pages 6 through 22 of Judge Greene's decision are set forth in Appendix B.

being "erroneous", sets forth the most cogent reasoning of all the courts which considered whether communications common carriers are immune from the antitrust laws. In that decision, the court set forth a thorough analysis of the practical nature of FCC regulation, and the relationship between such regulation and the conduct alleged to be immune.

For example, the court stated at page 12:

> "To carry that burden, defendants rely on the Supreme Court decisions[4] discussed above which found certain companies to be immune from the antitrust laws based upon a degree of regulation by government agencies which, as a practical matter, left them no choice but to follow the regulatory schemes and orders. But such regulation is not present in this case."

The court further stated at page 16:

> "The statutory weaknesses, the general ability of the Commission to scrutinize all the tariffs submitted to it, and perhaps other factors (e.g., the lack of adequate resources effectively to regulate AT&T, a corporate giant), have produced the result of a far less than pervasive or specific regulation of the areas that are critical to this case. In any event, whatever the reasons, it is clear that regulation of defendants' conduct has not been such that this antitrust action should disturb or interfere with it." (Footnotes omitted.)

The rationale of the court is best summarized by reference to the court's own words at page 19:

[4]The decisions referred to by the district court include *Gordon v. New York Stock Exchange*, 422 U.S. 659 (1975), and *United States v. National Association of Securities Dealers*, 422 U.S. 694 (1975).

> "In short, it would be a gross misconception of the realities to equate the instant statutory scheme, the relatively weak regulatory controls which have implemented that scheme, and defendants' alleged activities which offend both the antitrust laws and the regulatory purposes, with the kind of explicit regulation endorsing industry conduct which the Supreme Court has held in relatively few instances to be inconsistent with antitrust enforcement." (Footnote omitted.)

Moreover, the court in *United States v. American Telephone and Telegraph Company, supra,* recognized the very fallacy involved in this case, namely that Western *cannot* be immune since it is not regulated. The court also pointed out that the challenged conduct revolved around the relationship between AT&T, Western, and Bell Labs and therefore could not be immune.

In this case, Milgo similarly charges that the conduct between AT&T, Western, and Bell Labs was violative of the antitrust laws.

Conclusion.

Petitioners therefore urge that this Court issue the requested writ as defined in the petition.

Respectfully submitted,

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APPENDIX A.

Reply of the Bell System Respondents.

Before the Federal Communications Commission, Washington, D. C. 20554.

In the Matter of American Telephone and Telegraph Company Long Lines Department (AT&T) Revisions of Wide Area Telephone (WATS) Private Line Service (PLS) Tariff F.C.C. No. 260 and The Western Union Telegraph Company (Western Union) Revisions of Tariff F.C.C. No. 254. Docket No. 19419.

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32. Thus, it is clear that what is "anticompetitive" in the sense of unfairly or unjustifiably restricting the competitive process depends upon what are the competitive rules. In this proceeding these rules are not as the antitrust courts conceive them for unregulated companies but as the Commission has established them for pervasively regulated telecommunications carriers.*

*The Supreme Court has recognized the inapplicability of the antitrust laws to pervasively regulated conduct and to conduct which is effectively regulated under a standard which is different from, and inconsistent with, the unidimensional competition standard of the antitrust laws. *See, e.g., Gordon v. New York Stock Exch., Inc.*, 422 U.S. 659 (1975); *United States v. National Ass'n of Sec. Dealers, Inc.*, 422 U.S. 694 (1975). And antitrust immunity has been specifically found in several recent antitrust cases attacking the terms, implementation and enforcement of the tariffs governing interconnection of customer-provided equipment and the requirement for protective connecting arrangements, including DAA's, and also attacking various pricing, marketing, and related activities of regulated telecommunications carriers. *See, e.g., Phonetele, Inc. v. American Tel. & Tel. Co.*, 435 F. Supp. 207 (C.D. Cal. 1977), *appeal pending; Dasa Corp. v. General Tel. Co. of Calif.*, 1977-2 Trade Cas. ¶ 61,610 (C.D. Cal. 1977) *appeal pending; Western Elec. Co. v. Milgo Electronic Corp.*, 1978-1 Trade Cas. ¶ 61,960 (S.D. Fla. 1976), *appeal dismissed*, 568 F.2d 1203 (5th Cir. 1978); *Essential Communications Sys., Inc. v. American Tel. & Tel. Co.*, 445 F. Supp. 1090 (D.N.J. 1978); *Mobilfone v. Commonwealth Tel. Co.*, 1978-1 Trade Cas. ¶ 61,873 3d Cir. 1978), aff'g 428 F. Supp. 131 (E.D. P. 1977); *Monitor Business Mach., Inc. v. American Tel. & Tel. Co.*, 1978-1 Trade Cas. ¶ 62,030 (C.D. Cal. 1978); *Selectron, Inc. v. Pacific Northwest Bell Tel. Co.*, Civ. No. 76-965-BE (D. Ore., June 19, 1978). The principle that the antitrust laws have been held inapplicable in a proceeding ostensibly brought under such laws make such laws *a fortiori* inapplicable to a proceeding brought under the Communications Act.

APPENDIX B.

Opinion.

United States District Court, for the District of Columbia.

United States of America, Plaintiff, v. American Telephone & Telegraph Company; Western Electric Co., Inc.; Bell Telephone Laboratories, Inc., Defendants. Civil Action No. 74-1698.

Filed: Sept. 11, 1978.

The motions before the Court address the Court's jurisdiction and they raise fundamental issues concerning the discovery that should govern the future path of this antitrust litigation. A recapitulation of the history of this case will be helpful to an understanding of these issues.

The complaint was filed on November 20, 1974. It alleges violations of Section 2 of the Sherman Act, 15 U.S.C. § 2, by the American Telephone and Telegraph Company (AT&T),[1] Western Electric Company,

[1]According to the government, AT&T is organized under the laws of the State of New York, with the stock of Western Electric, fifty per cent of the stock of Bell Labs, and all or part of the stock of the 23 Bell Operating Companies as its principal assets. It is divided operationally into two major divisions: Long Lines and the General Departments. Long Lines, which has a certificate of convenience and necessity from the Federal Communications Commission, provides interstate telephone service, and files tariffs with the Commission governing the terms, rates and conditions of its service. The General Departments provide AT&T, Western Electric, Bell Labs, and the Bell Operating Companies with various kinds of advice and assistance. The General Departments have no federal or state certificates of public convenience and they file no tariffs.

Inc. (Western Electric),[2] and Bell Telephone Laboratories, Inc. (Bell Labs).[3] In sweeping language the complaint alleges that an unlawful combination and conspiracy exists and has existed for many

been attempted has been the subject of intense controversy.

The case was assigned to this Court on June 22, 1978. On July 6, 1978, the parties were directed to file status memoranda on all outstanding issues, and on August 21, 1978, argument was heard on these matters.[16] While these issues arose in varying procedural contexts, they may conveniently be discussed under four headings: (1) jurisdiction, (2) the nature of the plaintiff, (3) the government's effort to secure access to documents collected in several private antitrust suits brought against defendants in other districts, and (4) the future course of this action, including the scheduling of proceedings and the authority of the Magistrate and the Special Masters.

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[2]Western Electric is the 12th largest individual corporation in the United States, with sales of over $7 billion. It owns fifty per cent of the stock of Bell Labs, and it has at least one wholly owned subsidiary. It is not regulated by any federal or state regulatory authority. See pp. 12-14, *infra*.

[3]Bell Labs is owned in equal parts by AT&T and Western Electric. It conducts research and development, primarily for AT&T, Western Electric, and Bell Operating Companies. Like Western Electric, it is not regulated by any federal or state regulatory authority. See pp. 12-14, *infra*.

[16]Because of the illness and death of Judge Joseph C. Waddy, to whom the case had originally been assigned, several motions were reargued to this Court.

I

In all of their submissions to this Court, defendants have vigorously and consistently raised the jurisdictional issue. They insist that an irreconcilable conflict exists between the antitrust laws and the regulatory scheme established by the relevant statutes,[17] that when there is such a conflict the antitrust laws must give way, and that therefore the Court lacks jurisdiction over this action. While in many respects defendants' contentions constitute reargruments of matters rejected by Judge Waddy in his order of November 24, 1976, in view of the importance of this issue, and since a claim of lack of jurisdiction may be raised and entertained at any time (Rule 12(h)(3), F.R.Civ.P.), I have independently considered the jurisdictional issues. Upon such reconsideration, I concur with Judge Waddy's conclusion that regulation by the Federal Communications Commission and state regulatory bodies does not immunize defendants from this antitrust action.

Telecommunications carriers clearly do not enjoy an express statutory immunity from antitrust enforcement with respect to the activities here involved. While Congress has not hesitated in so many words to exempt the practices of other industries from the antitrust laws,[18] and while it has statutorily exempted some

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[17]Principally the Communications Act of 1934, 47 U.S.C. § 151, et seq.

[18]*E.g.*, insurance (McCarran-Ferguson Act, 15 U.S.C. § 1012); air transportation (Federal Aviation Act, 49 U.S.C. § 1384); export trade associations (Webb-Pomerene Act, 15 U.S.C. § 62); surface transportation (Reed-Bulwinkle Act of 1948, 49 U.S.C. § 56(9)).

activities of telephone companies from those laws,[19] it has not done so with respect to the conduct which is the subject matter of this complaint. Likewise, defendants have cited nothing in the legislative history of the statutes regulating the telecommunications industry which would lead to the conclusion that an antitrust immunity was contemplated when those statutes were enacted. Thus, if the Court lacks jurisdiction, it could only be because defendants enjoy an immunity by implication, resulting from an incompatibility between the antitrust laws and the statutes which regulate the telecommunications industry.

The problem created by the tension between the antitrust laws and economic regulation has been long recognized. See, *e.g., United States v. Trans-Missouri Freight Association,* 166 U.S. 290 (1879); 2 A. Kahn, *The Economics of Regulation: Principles and Institutions* 1, 4-5 (1971). Broadly speaking the antitrust laws are rooted in the proposition that the public interest is best protected by competition, free from artificial restraints such as price-fixing and monopoly.[20] The theory of regulation, on the other hand, presupposes that with respect to certain areas of economic activity

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[19]47 U.S.C. §§ 221(a) and 222(c)(1) exempt certain FCC-approved consolidations and mergers of telephone companies.

[20]The antitrust laws are a "comprehensive charter of economic liberty" (*Northern Pac. R. Co. v. United States,* 356 U.S. 1, 4 (1958)) whose goals have been described in many ways, from the advancement of consumer welfare (Bork, *The Antitrust Paradox* (1978), pp. 50-66) to the more radical objective of the diffusion of power in economic decision-making (A. Neale, *The Antitrust Laws of the USA* (2d ed. 1970), pp. 427-432; and Mr. Justice Douglas' dissent in *United States v. Columbia Steel Co.,* 334 U.S. 495, 536 (1948). See also, P. Areeda and D. Turner, Antitrust Law, vol. 1, par. 103, et seq. (1978).

the judgment of expert agencies may produce results superior to those of the marketplace,[21] and that for this reason competition in a particular industry will not necessarily serve the public interest.[22] Because of these divergent objectives, it could be, and has been, argued that whenever the Congress has established a scheme of regulation through an independent commission, it must be deemed to have determined that the antitrust laws should not apply to the industry thus being regulated. That, however, is not the law.

The Supreme Court has repeatedly noted that "repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions." *Otter Tail Power Co. v. United States,* 410 U.S. 366, 373 (1973), quoting *United States v. Philadelphia National Bank,* 374 U.S. 321 (1963). Accord, *Federal Maritime Commission v. Seatrain Lines, Inc.,* 411 U.S. 726, 733 (1973); *Merrill Lynch, Pierce, Fenner & Smith v. Ware,* 414 U.S. 117, 126 (1973); *Carnation Co. v. Pacific Westbound Conference, et al.,* 383 U.S. 213, 217-8 (1966); *Silver v. New York Stock Exchange,* 373 U.S. 341, 357-8 (1963); *United States v. Borden Co.,* 508 U.S. 188, 198-9 (1939).

Regulated industries "are not per se exempt from the Sherman Act" (*Georgia v. Pennsylvania R. R.*

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[21]However, regulatory agencies sometimes seek to achieve their objectives, at least in part, through the fostering of competition.

[22]This may be so because the market is one of natural monopoly, in that it is incapable effectively to support more than one firm, or because of other economic, public policy, or political reasons.

Co., 324 U.S. 439, 456 (1945)),[23] and they are not necessarily exempt even if the conduct complained of in an antitrust context has been expressly approved by the agency charged with regulating the particular industry.

In *United States v. Radio Corporation of America*, 358 U.S. 334 (1959), a decision by the Federal Communications Commission specifically approving an exchange of television stations was asserted as a defense to an antitrust divestiture action. The Supreme Court rejected that contention, holding, as Mr. Justice Harlan expressed it in his concurring summary of the Court's decision (358 U.S. at 353), "a Commission determination of 'public interest, convenience, and necessity' cannot either constitute a binding adjudication upon any antitrust issues that may be involved in the Commission's proceeding or serve to exempt a licensee pro tanto from the antitrust laws. . . ."[24] See also *California v. Federal Power Commission*, 369 U.S. 482 (1962); *United States v. Philadelphia National Bank*, *supra*; *Otter Tail Power Co. v. United States*, *supra*.[25]

[23]The antitrust laws apply notwithstanding regulation in such industries as the production of natural gas (*California v. Federal Power Commission*, 369 U.S. 482 (1962)); generation and transmission of electric power (*Otter Tail Power Co. v. United States*, *supra*); national banking (*United States v. Philadelphia National Bank*, *supra*); securities and commodities exchanges (*Silver v. New York Stock Exchange*, *supra*; *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289 (1973)); and broadcasting (*United States v. Radio Corporation of America*, 358 U.S. 334 (1959)).

[24]If the law were otherwise, the specific statutory immunity granted, for example, to telephone companies with respect to certain FCC-approved mergers (see Note 19, *supra*), would be redundant and unnecessary. See *Wilderness Society v. Morton*, 156 U.S. App. D.C. 121, 479 F.2d 842, 856 (1973), *cert. denied*, 411 U.S. 917 (1973); *National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 414 U.S. 453 (1974).

These principles have been applied to the area of jurisdiction of the Federal Communications Commission (*United States v. Radio Corporation of America*, *supra*) and to telephone companies specifically. *E.g.*, *Industrial Communications Systems, Inc. v. Pacific Tel. & Tel.*, 505 F.2d 152, 156 (9th Cir. 1974); *International Tel. & Tel. v. General Telephone & Electronics Corp.*, 351 F. Supp. 1153, 1182 (D. Hawaii, 1972), *aff'd. in part and rev'd. in part*, 518 F.2d 913, 918-20 (9th Cir. 1975); *Macon Products Corp. v. Am. Tel. & Tel. Co.*, 359 F. Supp. 973 (C.D. Cal. 1973).

Regulated conduct is, however, deemed to be immune by implication from the antitrust laws in two[26] relatively narrow instances: (1) when a regulatory agency has, with congressional approval, exercised explicit authority over the challenged practice itself (as distinguished from the general subject matter) in such

[25]*Otter Tail* involved a District Court decree which required an electric power utility company to remedy its antitrust violations by establishing certain power interconnections. In response to the company's argument that by reason of the Federal Power Act it was not subject to the antitrust laws, the Supreme Court stated that, absent a direct conflict between the federal judicial decree and an order of the Federal Power Commission concerning specific interconnections, antitrust jurisdiction was not ousted. "It will be time enough to consider whether the antitrust remedy may override the power of the [Federal Power] Commission under § 202(b) as, if, and when the Commission denies the interconnection and the District Court nevertheless undertakes to direct it" (410 U.S. at 377).

[26]The two categories are not clearly distinct, and they sometimes merge in their analysis and application.

a way that antitrust enforcement would interfere with regulation (*Pan American World Airways v. United States*, 371 U.S. 269 (1963); *Gordon v. New York Stock Exchange*, 422 U.S. 659 (1975); *United States v. National Association of Security Dealers*, 422 U.S. 694 (1975)), and (2) when regulation by an agency over an industry or some of its components or practices is so pervasive that Congress is assumed to have determined competition to be an inadequate means of vindicating the public interest. *Otter Tail Power Co. v. United States, supra*, 410 U.S. at 373-78; *United States v. National Association of Security Dealers, supra; Silver v. New York Stock Exchange, supra.*

Gordon v. New York Stock Exchange, supra, upon which defendants heavily rely, and *United States v. National Association of Security Dealers* (NASD), *supra*, decided the same day, are the most recent Supreme Court expressions on the kind of analysis that must be applied in determining when an antitrust suit will lie against a member of a regulated industry.

Gordon was an action brought by small investors who challenged a system of fixed stock exchange commission rates sanctioned by the SEC. In its decision, the Court reaffirmed what it had held many times before: that repeal of the antitrust laws is not favored; that repeal will be implied only where there is a plain repugnancy between antitrust and regulatory provisions and then only to the minimum extent necessary; that in the absence of regulatory supervision there can be no conflict; and that both the presence of a pervasive regulatory scheme and the existence of regulatory action under a specific regulatory provision are factors in finding a repeal of the antitrust laws by implication

(422 U.S. at 682-689). The Court then went on to find regulation by the SEC to be such regulatory action, and section 19(b)(9) of the Securities Exchange Act of 1934, 15 U.S.C. § 785(b), which grants to the Commission review power over the fixing of commission rates, to be such a specific regulatory provision.

The Court indicated that in making that determination it was heavily influenced by two factors: (1) by granting to the SEC permission to approve the fixing of commission rates after the Court's decision in *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927) (which had held this kind of rate fixing to be a per se violation of the Sherman Act), the Congress had made a deliberate choice to give the agency the authority to supervise self-regulation with respect to commission rate fixing (422 U.S. at 681, 685), and (2) the Commission had "taken an active role in review of proposed rate changes during the last 15 years" (422 U.S. at 685). Thus it concluded (422 U.S. at 681),

> The statutory provision authorizing regulation, § 19(b)(9), the long regulatory practice, and the continued congressional approval illustrated by the new legislation, point to one, and only one, conclusion. The Securities Exchange Act was intended by Congress to leave the supervision of the fixing of reasonable rates of commission to the SEC. Interposition of the antitrust laws, which would bar fixed commission rates as per se violations of the Sherman Act, in the face of positive SEC action, would preclude and prevent the operation of the Exchange Act as intended by Congress and as effectuated through SEC regulatory activity. Implied repeal of the antitrust laws is, in fact,

necessary to make the Exchange Act work as it was intended; failure to imply repeal would render nugatory the legislative provision for regulatory agency supervision of exchange commission rates.

Similarly, in *NASD, supra,* the Court held that vertical restrictions in secondary market activities designed to maintain prices in brokerage transactions of specified mutual fund shares were precisely among the kinds of restrictions on competition that Congress might have thought were "necessitated by the unique problems of the mutual fund industry . . ." (422 U.S. at 729) when it enacted section 22(f) of the Investment Company Act of 1940, 15 U.S.C. §80a-1 et seq. With respect to the alleged horizontal combination and conspiracy to prevent the growth of a secondary dealer market in the purchase and sale of mutual fund shares, the Court found the SEC's exercise of regulatory authority to be so pervasive as to confer an implied immunity. The Court held "fatal" to the government's complaint that the SEC had consistently and for nearly 35 years approved the restrictive agreements to which the activities the antitrust action sought to curb were ancillary (422 U.S. 733-4), and it found significant the SEC's urging that its authority would be seriously compromised if the agreements were deemed actionable under the Sherman Act (422 U.S. at 729).[27]

[27] *Hughes Tool Co. v. Trans World Airlines, Inc.,* 409 U.S. 363 (1972), and *Pan American World Airways v. United States, supra,* also relied on by defendants in this proceeding, involved similarly explicit regulatory schemes. In *Hughes Tool,* the Court found that the challenged transactions fell precisely within the detailed scheme for administrative treatment established by Congress in section 408 of the Federal Aviation Act of 1958, 49 U.S.C. § 1378, and that, inasmuch as the Civil Aeronautics Board had issued an order under that section approving them, the transactions were immunized from the antitrust laws by section 414 of the Act, 49 U.S.C. § 1384. Similarly, in *Pan American Airways,* the Court held that section 411 of the Federal Aviation Act of 1948, 49 U.S.C. § 1381, had granted to the CAB the very jurisdiction (over unfair competition in air traffic) that was at the heart of the antitrust complaint.

Thus, the inquiry in this case must focus upon (1) whether the activities which are the subject of this complaint were required or approved by the Federal Communications Commission pursuant to explicit statutory authority, in a way that is incompatible with antitrust enforcement, and (2) whether these activities are being so "pervasively" regulated that an immunity from antitrust action must be assumed. In my judgment, these questions must be answered in the negative.

We do not start with a clean slate, neatly balancing whether there should or should not be antitrust jurisdiction. The complaint alleges serious violations of the Sherman Act, and if the government is able to prove these allegations, it follows that a substantial violation of that fundamental charter of American economic life has occurred. The burden is on defendants to demonstrate that they or their practices were intended to be exempt or immune from the broad mandate of the Act. To carry that burden, defendants rely on the Supreme Court decisions discussed above which found certain companies to be immune from the antitrust laws based upon a degree of regulation by government agencies which, as a practical matter, left them no choice but to follow the regulatory schemes and orders. But such regulation is not present in this case.

At the outset, it must be noted that two of the defendants in the instant action, Western Electric and Bell Labs, are not subject to direct regulation by the

Federal Communications Commission at all. Defendants' assertion that "each of the general charges of alleged conduct . . . relates to matters which are within the jurisdiction of the regulatory agencies" (Status Memorandum, p. 5), is contradicted by the more precise and more accurate statement of the Federal Communications Commission (Memorandum as *amicus curiae*, filed December 30, 1975, pp. 21-25) that it "has no direct regulatory responsibility for . . . Western Electric and Bell Laboratories," although it may indirectly affect them through its determinations of the reasonableness of expense and rate base items claimed by AT&T. See *Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133 (1930). Legislative history over the years shows that congressional concern over AT&T's intra-corporate structure never matured beyond directing the Federal Communications Commission to conduct a study. Once that study was completed (Federal Communications Commission, *Report on the Investigation of the Telephone Industry in the United States*, H.R. Doc. No. 340, 76th Cong., 1st Sess. (1939)), Congress took no further action, nor was the Commission given authority to take further action.

Consequently, it has been the Federal Communications Commission's consistent position that it has no authority to alter, regulate, or otherwise to interfere with AT&T's internal structure, including its relationships with Western Electric and Bell Labs. See Federal Communications Commission, *Report on the Investigation of the Telephone Industry in the United States*, *supra*, at 487-589; Consent Decree Program of the Department of Justice, *Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary*,

85th Cong., 2d Sess. Part II-Vol. II (1958);[28] Consent Decree Program of the Department of Justice, *Hearings before the Antitrust Subcommittee of the House Committee of the Judiciary*, 85th Cong., 2d Sess. Part II-Vol. III (1958);[29] Antitrust Problems of the Space Satellite Communications System, *Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 87th Cong., 2d Sess. 281 (1962);[30] *AT&T Charges for Interstate Telephone Service (Phase II)* 64 FCC.2d 1 (1977), pp. 15, 18, 20, 27; and see *International Tel. & Tel. Co. v. General Telephone & Electronics Corp.*, 518 F.2d 913 (9th Cir. 1975). Beyond broad general statements, defendants have cited nothing to the contrary. In view of this history, it is difficult to see on what basis Western Electric, Bell Labs, or the relationships involving them, could be considered immune from the antitrust laws on any theory.

AT&T's Long Lines Department and the Bell Operating Companies are in a somewhat different posture,

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[28]A letter dated November 30, 1955, from Chairman George C. McConnaughey of the Federal Communications Commission to the Attorney General, introduced at the 1958 hearings, states that "the operations of Western, including its prices and profits, are, of course, not subject to direct control by any regulatory authority." Consent Decree Program of the Department of Justice, *supra*, vol. II at 2233-34.

[29]Bernard Strassburg, Chief of the Telephone Division of the Federal Communications Commission, testified in those hearings that the Commission lacks the authority to directly regulate Western Electric. Consent Decree Program of the Department of Justice, *supra*, vol. III at 3446, 3543-44.

[30]Chairman Newton N. Minow of the Federal Communications Commission testified before the Committee in 1962 that "we have no statutory authority to regulate the prices charged by Western Electric for its equipment sales to the American Telephone & Telegraph Co." Antitrust Problems of the Space Satellite Communications System, *supra* at 283.

for they are subject to FCC regulation in a variety of ways, and the Commission has to a substantial extent exercised this authority. See, *e.g., Specialized Common Carrier Services,* 29 FCC.2d 870, 31 FCC.2d 1106 (1971), *aff'd. sub nom., Washington Utilities and Transportation Commission v. Federal Communications Commission,* 513 F.2d 1142 (9th Cir. 1975), *cert. denied sub nom., National Association of Regulatory Utility Commissioners v. Federal Communications Commission,* 423 U.S. 836 (1975); *MCI Communications Corp. v. Am. Tel. & Tel. Co.,* 496 F.2d 214 (3rd Cir. 1974). But there is nothing in either the Communications Act or the related statutes to suggest that, with respect to the activities and relationships[31] which are significant to this case, Congress intended to vest in the Federal Communications Commission such pervasive regulatory authority as to override antitrust considerations, nor is there anything to indicate that the antitrust laws are incompatible with the operation of these regulatory statutes as intended by the Congress.

The situation here is thus considerably different from that presented in *Gordon v. New York Stock Exchange, supra.*[32] In *Gordon* the Supreme Court said that the antitrust laws could not be applied where the Congress had given the Securities and Exchange Commission

[31]*E.g.,* relationships with private mobile radio systems, radio common carriers, miscellaneous common carriers, specialized common carriers, and manufacturers and sellers of terminal equipment for communications systems.

[32]The distinction is significant inasmuch as *Gordon,* and its companion case *United States v. National Association of Security Dealers,* represent the outer limits of the Supreme Court's application of the implied immunity doctrine. Other Supreme Court law is even more hospitable to the antitrust laws and less apt to imply an immunity.

exclusive jurisdiction to supervise the fixing of rates of commission for transactions on the stock exchanges and where the Securities and Exchange Commission had in fact exercised that jursdiction. By contrast, the Federal Communications Commission has not been granted exclusive jurisdiction over what may be called the interconnection areas,[33] but by statute shares that jursdiction with the courts. 47 U.S.C. § 406.[34]

More importantly, the regulatory charter of the Commission itself, while broad in many respects, is at the same time relatively weak. For example, telephone tariffs—a primary regulatory tool—become effective upon filing by the carrier after 90 days notice without the necessity for Commission scrutiny or approval (47 U.S.C. § 203(b)(1)); a carrier may file a new or revised tariff at any time (47 U.S.C. § 204); and the power of the Commission to suspend a tariff is limited to a five-month maximum (47 U.S.C. § 204). The weakness of the regulatory scheme is reinforced by a volume of tariff filings beyond the capacity of the Commission to handle. During the 12-month period from September 1974 through August 1975, the Commission received 1,371 tariff filings totaling 11,491

[33]In addition to certain claimed violations with respect to manufacturing, research, and sales and purchases of the fruits of manufacturing and research, much of this suit involves defendants' alleged failure to allow various types of entities to interconnect.

[34]Section 406 provides that "the district courts of the United States shall have jurisdiction . . . [of allegations of] any violation, by a carrier subject to this chapter which prevent the relator from receiving service in interstate or foreign communication by wire or radio, or in interstate or foreign transmission of energy by radio, from said carrier at the same charges, or upon terms or conditions as favorable as those given by said carrier for like communication or transmission under similar conditions to any other persons." See also, 47 U.S.C. §§ 207, 407, 414.

pages, and because of this volume, it was able to investigate only a small percentage of the tariffs. Thus, it is not surprising that the Commission has concluded that "rate filings generally proceed from the carrier's independent judgment. . . ." Memorandum of FCC, filed December 30, 1975, pp. 19-20.

The statutory weaknesses, the general inability of the Commission to scrutinize all the tariffs submitted to it, and perhaps other factors (*e.g.*, the lack of adequate resources effectively to regulate AT&T, a corporate giant),[35] have produced the result of a far less than pervasive or specific regulation of the areas that are critical to this case. In any event, whatever the reasons, it is clear that regulation of defendants' conduct has not been such that this antitrust action would disturb or interfere with it.[36]

The FCC—unlike, for example, the SEC in the stock exchange cases—has consistently taken the position that antitrust enforcement through court action is not precluded in this area.[37] *In the Matter of Amendment of Subpart F of Part 1 of the Commission's Rules*, 42 FCC 905, 906, 910-912 (1959); *In the Matter of the Applications of the Connecticut Water Co. & Woolridge Bros., Inc.*, 25 FCC 1367, 1378

[35]See, *e.g.*, Business Week, *Why the Justice Department Took AT&T to Court*, (Nov. 30, 1974) pp. 68-70.

[36]Even when the regulation is "pervasive," and the precise conduct attacked in an antitrust suit is being regulated, an immunity will be found only if the antitrust remedy conflicts with rather than complements the enforcement efforts of the regulatory agency. *Mt. Hood Stages, Inc. v. Greyhound Corp.*, 555 F.2d 687 (9th Cir. 1977), *vacated and remanded on other grounds*, 46 U.S.L.W. 4719 (June 19, 1978).

[37]An agency's consistent construction of its own enabling legislation is entitled to considerable weight. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 1969).

(1958). In its memorandum filed with the Court in this case on December 30, 1975, the Commission noted (p. 27):

> To the Commission's knowledge, no court has ruled that the regulatory jurisdiction of the FCC and/or state agencies has ousted entirely the antitrust jurisdiction of the district courts. Several courts have expressly rejected that argument, and have held that primary jurisdiction referral is the appropriate accommodation . . . The Commission has accepted primary jurisdiction referrals in many cases, has resolved the issues referred for its consideration, and has certified back the results for the courts' ultimate determination . . . This procedure has satisfactorily accommodated the regulatory requirements, and the Commission believes it to be preferable to total ouster of the antitrust courts.

Among the considerations it cited in support of its position, the Commission stressed, *inter alia*, that, while under section 214 of the Communications Act, 47 U.S.C. § 214, it has exclusive market entry authority, antitrust actions not only do not necessarily conflict with that authority, but might even complement it in appropriate circumstances; the courts and the Commission have concurrent responsibilities, but when there is a conflict, the doctrine of primary jurisdiction[38] is adequate to resolve the matter; the Commission has never considered its authority over equipment interconnection to displace the antitrust laws; and even with respect to tariffs, since, as noted *supra*, they often become effective without Commission scrutiny

[38]See note 45, *infra*.

or approval, the courts appropriately exercise antitrust jurisdiction.[39]

An examination of the complaint in this proceeding against the implied immunity doctrine and its philosophic underpinnings verifies the Commission's conclusion.[40] The allegations of the complaint describe

[39]The Commission considers, however, that when it has prescribed or specifically approved a tariff, its judgment must control (FCC Memorandum of December 30, 1975, p. 20).

[40]While the district court decisions are not entirely consistent in this area, the better-reasoned cases likewise support these conclusions. In *Jarvis v. Am. Tel. & Tel.*, Civ. 74-1674 (D.D.C. August 7, 1978), Judge Robinson of this Court held that Commission regulation of interconnection and tariffs over this defendant is not so pervasive that regulatory control should be deemed inconsistent with the application of the antitrust laws. See also, *Industrial Comm. Sys. Inc. v. Pac. Tel. & Tel. Co.*, 505 F.2d 152, 156 (9th Cir. 1974); *Macon Products Corp. v. Am. Tel. & Tel. Co.*, 359 F. Supp. 973, 976 (C.D. Cal. 1973). Despite defendants' contention that *Jarvis* is in error (Defendants' Reply to Supplemental Response for the United States), the decision is consistent with both the Supreme Court's and the Feeral Communications Commission's views. See *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976); *Georgia v. Pennslyvania R. R. Co.*, 324 U.S. 439, 454-460 (1945); Response of Federal Communications Commission in *Am. Tel. & Tel. Co. v. United States*, No. 77-1009 (D.C. Cir.), p. 18. The decisions cited by defendants in this regard are inapposite. *Western Electric Co. v. Milgo Electronics Corp.*, 1978-1 Trade Cases, No. 61,960 (S.D. Fla. 1976), *appeal dismissed*, 508 F.2d 1203 (5th Cir. 1978), involved a question of standing, the court noting only that because of a recent administrative program instituted by the FCC, certain paragraphs of a counterclaim might not be properly before the court. In *Citizens Utilities Co. v. Am. Tel. & Tel. Co.*, 1978-1 Trade Cases, No. 61,959 (N.D. Cal. 1977), the court dismissed a sixteen-year old antitrust case for want of prosecution, stating by way of dictum that dismissal might also be warranted on exclusive or primary jurisdiction grounds because the FCC was the proper forum for the subject matter (division of revenues within the telephone industry). In *Data Corp. v. General Telephone Co. of California*, 1977-2 Trade Cases No. 61,610 (C.D. Cal. 1977), the court dismissed the complaint because of the peculiar subject matter, but expressly disavowed holding "that the telephone companies may never be sued under the antitrust laws," citing Judge Waddy's opinion in the instant case. *Monitor Business Machines, Inc. v. Am. Tel. & Tel. Co.*, 1978-1 Trade Cases, No. 62,610 (C.D. Cal. 1978), and *Phonetele Inc. v. Am. Tel. & Tel. Co.*, 435 F. Supp. 207 (C.D. Cal. 1977), both involved relatively narrow interconnection areas which the courts found to have been extensively regulated by the Federal Communications Commission. In short, all of these cases are distinguishable on their facts. To the extent that some language in the opinions may differ from the conclusion reached here, like Judge Robinson in *Jarvis*, I decline to follow them.

conduct that quite obviously was not stimulated by regulatory supervision or coercion; it is of a character that reflects defendants' business judgment that its profits might be maximized if potential competitors were discouraged from entering the various markets AT&T controls. See *Federal Maritime Commission v. Seatrain Lines, Inc., supra*, 411 U.S. at 733; *Otter Tail Power Co. v. United States, supra*, 410 U.S. at 374; *Silver v. New York Stock Exchange, supra.*

According to the complaint,[41] defendants have chosen to engage in a variety of predatory activities designed to shut out potential competitors from the telecommunications markets, including the denial to competing entities of interconnection privileges with AT&T's monopoly facilities; unlawful rate adjustments in response to competition; refusal to permit telephone customers to provide their own terminal equipment and to interconnect it to AT&T's network; and perpetuation of various production and marketing practices designed to curb competition. There is absolutely nothing to suggest that Congress expected the Commission to require or approve, or that the Commission did require or approve any of these practices. These activities not only violate the antitrust laws but they are also inconsistent with the purpose of the regulation, or at the very least they are not required or encouraged either by regulatory theory or by regulatory action.

[41]See pp. 1-2, *supra.*

In such a posture, the abstract philosophical differences between regulation and competition will hardly serve to oust the antitrust laws from their normal function and effect. The purpose of the implied immunity rule is to eliminate adherence to antitrust standards when there are irreconcilable differences between the antitrust laws and federal regulatory statutes.[42] But the antitrust laws cannot be held hostage to a supposed irreconcilability between antitrust and regulatory enforcement when no such irreconcilability exists in fact, nor can the alleged unlawful actions fo defendants be deemed protected from the Sherman Act by the cloak of generalized regulation of AT&T by the Commission.

In short, it would be a gross misconception of the realities to equate the instant statutory scheme, the relatively weak regulatory controls which have implemented that scheme, and defendant's alleged activities which offend both the antitrust laws and the regulatory purposes, with the kind of explicit regulation endorsing industry conduct which the Supreme Court has held in relatively few instances to be inconsistent with antitrust enforcement.[43]

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[42]Immunity will be implied only if necessary to make the regulatory statutes work, "and even then only to the minimum extent necessary." *Gordon v. New York Stock Exchange, supra,* 422 U.S. at 685.

[43]Additionally, it is not insignificant that, even with respect to that portion of defendants' activities which the Commission does regulate, only the courts can grant complete relief. The Commission has little authority to vindicate injury to competitors; there is no statutory provision authorizing it to order divestiture; and it is unable to adopt remedies designed to foreclose future anticompetitive conduct. See generally, *Am. Tel. & Tel. Co. v. FCC,* 487 F.2d 865, 881 (2d Cir. 1973); *Nader v. FCC,* 172 U.S. App. D.C. 1, 520 F.2d 182, 206 (1975); cf. *Hewitt-Robins v. Freight-Ways, Inc.,* 371 U.S. 84 (1962); but see, *General Telephone Co. of the Southwest v. United States,* 449 F.2d 846 (5th Cir. 1971). Congress could hardly be deemed by implication to have conferred immunity on carriers such as these defendants when the effect of its assumed action would be to insulate the alleged antitrust violators from effective sanctions or relief.

There is another, alternative basis for reaching the same conclusion. This complaint alleges a broad conspiracy to monoplize various aspects of the telecommunications industry through a symbiotic relationship among AT&T, Western Electric, Bell Labs, and the Bell Operating Companies (see p. 2, *supra*). Even if it be assumed, *arguendo*, that the Commission exercised explicit regulatory authority over only some segments of the activities challenged in the complaint, it does not follow that defendants are immune from antitrust liability even with respect to them. Defendants' purpose is alleged to be the monopolization of the telecommunications service and equipment market, and the bulk of their conduct, including that revolving around Western Electric and Bell Labs, cannot under any reasonable view be regarded as immune from antitrust enforcement by virtue of regulation. In that circumstance, the remainder of the challenged conduct is likewise subject to antitrust consideration, both because it constitutes a means for achieving an unlawful end (*California Motor Transport v. Trucking Unlimited,* 404 U.S. 508, 515 (1972)), and because it represents one facet of a larger monopolistic scheme. See *Carnation Co. v. Pacific Westbound Conference,* 383 U.S. 213, 222 (1966); *Continental Ore Co. v. Union Carbide & Carbon Corp.,* 370 U.S. 690 (1962); *Ricci v. Chicago Mercantile Exchange,* 409 U.S. 289, 316 (1973) (Marshall, Jr., dissenting).

According to the government (Brief in *Am. Tel. & Tel. Co. v. United States,* No. 77-1109 (D.C. Dir.),

pp. 5-6), defendants dominate three markets—long distance transmission, equipment manufacturing, and local franchise monopolies—and they use the leverage from their control of each to defend and support their monopoly position in the other two. It is precisely in this kind of situation, that the doctrine of primary jurisdiction is most useful,[44] and this Court is fully prepared to refer appropriate issues to the FCC under that doctrine (see note 45, *infra*). But it would subvert the purposes of the antitrust laws totally to sever from the case and to refer to the Commission some of the issues on the theory that it has exclusive jurisdiction when the consequence of such a referral would be that a significant portion of what is alleged to be one comprehensive, integrated, and mutually supporting conspiracy could never be considered by the courts. See *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439 (1945). This would then leave the courts with a truncated antitrust action—a result that would stand the principle of careful non-interference between legitimate regulatory and antitrust enforcement on its head.

While it is not necessary here to rely directly upon these "comprehensive monopoly" principles in adjudicating the jurisdictional issue, they provide additional and alternative support for the conclusion that antitrust jurisdiction has not been ousted by the regulatory scheme.

For these reasons, the Court rejects defendants' contention that the Court lacks antitrust jurisdiction over the matters alleged in the complaint. However, in the event that it should subsequently appear after the issues have been crystallized—*e.g.*, after discovery has been

[44]See Mr. Justice Brennan's dissent in *Pan American World Airways v. United States, supra*, 371 U.S. at 331-2.

completed—that with respect to some of defendants' conduct the Commission has special expertise or there may be a conflict between antitrust enforcement and regulation, the issues relating to such conduct will be referred to the Commission under the doctrine of primary jurisdiction.[45] But there is no basis for defendants' continued insistence that the jurisdictional issue[46] is not settled[47] or that, until it is settled in

[45]While the term "primary jurisdiction" has been widely used, including by the U.S. Supreme Court, it deserves some clarification. A referral under that doctrine does not oust a court of jursidiction; it merely serves as a means for requesting a regulatory agency to make preliminary factual and legal determinations while reserving to the court the authority to decide the ultimate questions. Judge Waddy's opinion of November 24, 1976 concluded that some of the issues herein might be referred to the FCC under that doctrine. It is clear from *Ricci v. Chicago Mercantile Exchange, supra*, that such a referral is appropriate particularly where there is a need to resolve possible conflicts between the objectives of the antitrust laws and the regulatory standards, and where an adjudication of such issues by the regulatory body will be of material aid in the ultimate decision of the antitrust issues. It is my intention, as it was Judge Waddy's, to make such appropriate references to the FCC. According to the Commission (Memorandum as *amicus curiae*, p. 29) issues which substantially affect the following matters should be referred to it under the principle of primary jurisdiction: (1) entry into or exit from a communications carrier market; (2) FCC orders requiring interconnection; and (3) tariff provisions which the Commission has approved or precluded. It would be premature at this point to conclude the extent to which these conditions exist with respect to particular issues in this case, or whether there may be other matters appropriate for referral to the Commission.

[46]*I.e.*, the issue of whether or not the Commission has *exclusive* jurisdiction.

[47]Throughout their status memoranda, defendants assert that there must be "a prompt determination of the jurisdictional issue" (Reply Memorandum, p. 3), that the means to expedite this case is to have "an early and definitive resolution of the fundamental jurisdictional issue that overhangs all of the proceedings in this case" (Reply Memorandum, p. 49), and that the Court will have to resolve "once and for all *whether*—and, if so, the extent to which—it has jurisdiction" (emphasis supplied) (Status Memorandum, p. 47)).

their favor, it is not possible to proceed with this case in a way that is fair to both parties. The issue was decided against defendants by Judge Waddy, and his decision was not disturbed either by the U.S. Court of Appeals or the U.S. Supreme Court. Upon careful reconsideration, this Court again reaches the conclusion that it has jurisdiction of this action and that no part of this case is within the exclusive jurisdiction of the Federal Communications Commission.[48]

II

Defendants have submitted a proposed order providing that "the plaintiff in this case is the government of the United States of America including all of the departments, agencies, bureaus, and other subdivisions thereof from which defendants have sought recovery." The effect of this order, if adopted by the Court, would be to subject all agencies and departments of the government to discovery under Rule 34 of the Federal Rules of Civil Procedure. The Department of Justice argues that only it is a party, and that discovery from other government agencies and departments must proceed under the more restrictive provisions of Rule 45, F.R.Civ.P. The question that is raised by these opposing positions is "who is the plaintiff?"

It should be noted at the outset that some discovery has been and is being secured to a limited extent from government agencies other than

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[48]For that reason defendants' proposed Pretrial Order No. 9 which would limit discovery to the jurisdictional issues *seriatim*, followed in each instance by further briefing and court review, is denied.